United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

29-3

347

APPELLANT'S PETITION FOR REHEARING AND/OR SUGGESTION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,503

UNITED STATES OF AMERICA

Appellee

v.

LOUIS S. LUMPKINS

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILTON A. KALLIS
JOHN H. TREANOR, JR.
Attorneys for Appellant
743 Washington Building
Washington, D. C. 20005
Telephone: 783-1950

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,503

UNITED STATES OF AMERICA

v.

LOUIS S. LUMPKINS,

Appellant

PETITION FOR REHEARING AND/OR SUGGESTION
FOR REHEARING EN BANC

Appellant, by Milton A. Kallis and John H. Treanor, Jr., his counsel, petitions for a rehearing and/or suggests a rehearing en banc for the reasons stated below.

At the outset, appellant's counsel are constrained to refer to a particular part of the court's opinion which is crucially misleading because it is incomplete and stated out of its true context. On Page 3 of the Opinion is the following sentence:

> "The coroner agreed that the wound could as readily have been caused by a fall on a piece of glass, and counsel properly stresses his testimony commenting on the significance of the fact that there was very little bruising around the laceration on the forehead which caused death."

Regrettably, the court was silent as to what was "the significance of the little bruising around" the lethal cut. The coroner

a duly licensed and experienced medical doctor, testified without contradiction that if Mrs. Lumpkins had been hit on the forehead with a large blunt object and further if the blow had resulted in the 3/4 inch long and 1/2 to 3/4 inch deep laceration which caused Mrs. Lumpkins to bleed to death, then there would have been "a large area of bruising about the laceration, if the laceration were to obtain." (Tr. 182). The coroner, however, testified that the wound "had very little very little surrounding hematoma or bruise," (Tr. 182) and that "there was some bruising but there was not a lot of bruising." (Tr. 183) (Emphasis added)

The real significance, therefore, of the "very little bruising around the laceration of the forehead which caused death" is that appellant Lumpkins did not strike his wife in the head with the bottle and hence he did not thus cause the 1/2 inch deep cut from which she bled to death. Counsel therefore respectfully and sincerely submit that there is at least a preponderance of probabilities in favor of appellant on this crucial point. If appellant did not cause the lethal laceration by striking his wife in the head with the bottle, then his conviction cannot stand. Counsel further submit that the uncontradicted undisputed conclusion of the physician coroner who performed the autopsy is entitled to more weight than the conclusion of the twelve jurors who were untrained and inexperienced in the medical science

involved in the determination of what caused Mrs. Lumpkins 1/2 inch deep lethal cut. There was no preponderant reason for the trial court and this court to prefer the speculation of the untrained jury to the judgment of the trained physician-coroner. In sum, all the evidence as to the cause of the lethal cut is to the effect that it was not caused by a blow from the gallon-size bottle in question but could quite plausibly have been caused by a fall to the floor covered by broken glass.

Implicit in its December 23, 1970, opinion is this court's lingering doubt as to appellant's guilt. Counsel again stresses that the case before the court is one of circumstantial evidence based entirely on speculation and that the proved facts do not lead to a legitimate inference beyond all reasonable doubt that appellant struck his wife with a bottle on her forehead and thus caused her death.

The opinion of this court in the instant appeal conflicts with previous opinions in this circuit. All the substantial evidence was at least as consistent with appellant's innocence as with his guilt. It was therefore this court's duty to reverse. Wigfall v. United States, 97 U.S. App. D.C. 252, 230 F. 2d 220 (1956); Hammond v. United States, 75 U.S. App. D.C. 397, 127 F.2d 752 (1942). See Battles v. United States, 388 F. 2d 799, 801-802 (5 Cir. 1968). This Court, however, did not apply the doctrines of these cases and apparently overruled them sub silentio.

To maintain uniformity and harmony of its own decisions and to effect a review of the entire record, this court should grant appellant's petition for rehearing and/or suggestion for rehearing en banc. If the court does rehear this appeal based on a review of all the record, counsel submit that it will conclude (a) that all the substantial evidence, including all the Government's evidence, was as consistent with a reasonable hypothesis of innocence and (b) that this evidence compels a brooding reasonable doubt of guilt.

Respectfully submitted,

Milton A. Kallis

John H. Treanor, Jr.

Attorneys for Appellant
743 Washington Building
Washington, D. C. 20005
Telephone: 783-1950

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,503

UNITED STATES OF AMERICA

v.

LOUIS S. LUMPKINS

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 10 1970

Nathan J. Paulson
CLERK

MILTON A. KALLIS
JOHN H. TREANOR, JR.
Attorneys for Appellant
Washington Building
1435 G Street, N. W.
Washington, D. C. 20005
Telephone: 783-1950
and 638-6996

TABLE OF CONTENTS

	Page
TABLE OF CASES	ii
STATEMENT OF ISSUES PRESENTED	iv
REFERENCES TO RULINGS	v
STATEMENT OF THE CASE	1
ARGUMENT:	
I. THE TRIAL JUDGE IMPROPERLY DENIED APPELLANT'S MOTION FOR ACQUITTAL OF THE OFFENSES OF SECOND-DEGREE MURDER AND MANSLAUGHTER	20
II. THE TRIAL JUDGE IMPROPERLY REFUSED TO INSTRUCT THE JURY ON SIMPLE ASSAULT DESPITE APPELLANT'S TIMELY REQUEST	24
III. THE TRIAL JUDGE'S INSTRUCTIONS ON MALICE AS AN ESSENTIAL INGREDIENT OF SECOND-DEGREE MURDER WERE PLAINLY ERRONEOUS AND POTENTIALLY PREJUDICIAL TO APPELLANT'S SUBSTANTIAL RIGHTS AND THEREFORE REQUIRE REVERSAL	25
IV. CONCLUSION	27

TABLE OF CASES

Page

* Carter v. United States,
102 U.S. App. D.C. 227,
252 F.2d 608 (1966) 23

* Curley v. United States,
81 U.S. App. D.C. 389,
160 F.2d 229, cert. denied,
331 U.S. 837 (1947) 22, 26

* Green v. United States,
____, U.S. App. D.C. ____,
405 F.2d 1368 (1969) 26

* Kimmel v. State,
198 Ind. 444, 154 N.E.
16 (1926) 22

Logan v. United States,
144 U.S. 263 (1892) 24, 25

* People v. Mulcahy,
318 Ill. 332,
149 N.E. 266 (1925) 22

Perry v. United States,
____ U.S. App. D.C. ____,
____ F.2d ____, (No. 21,
936 decided September 15, 1969 25

Powell v. United States,
____ U.S. App. D.C. ____,
____ F.2d ____, (No. 21, 678
decided June 11, 1969) 22, 26

United States v. Bryant,
____ U.S. App. D.C. ____,
____ F.2d ____, (No. 22,511
decided December 11, 1969) 27

* Cases chiefly relied upon are marked by an asterisk.

Page

* United States v. Bush,
____ U.S. App. D.C. ____,
____ F.2d ____, (No. 23,338
decided August 15, 1969) 22, 24

* United States v. Comer,
____ U.S. App. D.C. ____,
____ F.2d ____, (No. 22,383
decided January 5, 1970) 22, 25

United States v. Green,
____ U. S. App. D. C. ____,
____ F.2d ____, (No. 23,003
decided February 19, 1970) 26

United States v. Hamilton,
182 F.Supp. 543 (D.C.D.C. 1960) 25

United States v. Skinner,
____ U.S. App. D.C. ____,
____ F.2d ____, (No. 22,776
decided February 10, 1970) 22, 24

*United States v. Wharton,
____ U.S. App. D.C. ____,
____ F. 2d ____, (No. 22433
decided January 5, 1970) 26, 27

* Cases chiefly relied upon are marked by an asterisk.

STATEMENT OF ISSUES PRESENTED

In the opinion of appellant, the following issues are presented:

1. Whether the trial judge improperly denied appellant's motion for acquittal of the offenses of second-degree murder and manslaughter.

2. Whether the trial judge improperly refused to instruct the jury on simple assault despite appellant's timely request.

3. Whether the trial judge's instructions on malice as an essential ingredient of second-degree murder were plainly erroneous and potentially prejudicial to appellant's substantial rights and therefore require reversal.

This case has not previously been before this Court.

REFERENCE TO RULINGS

	Transcript Page
Appellant's oral motion for judgment of acquittal at end of Government's case	188
Court's denial of motion for judgment of acquittal	190
Court's statement that defendant is either guilty of second-degree murder or not guilty of an offense	253, 256
Prosecutor's statement of agreement with court as to absence of manslaughter case	256
Prosecutor's request for manslaughter instruction	264
Court's granting prosecutor's request for manslaughter instruction	264
Appellant's motion for simple assault instruction	261
Court's denial of motion for simple assault instruction	263
Court's instructions on malice as essential ingredient of second-degree murder	297, 298

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23503

UNITED STATES OF AMERICA

v.

LOUIS S. LUMPKINS

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATEMENT OF THE CASE

I. Preliminary Statement

Sometime either in the late evening of July 19 or in the early morning of July 20, 1968, Betty Lumpkins bled to death from a deep laceration on her forehead. Appellant, Louis S. Lumpkins, husband of the deceased, was indicted for the second-degree murder of his wife. The grand jury charged that he "with malice aforethought, did strike Betty Lumpkins

with a bottle, causing injuries" from which she died on or about July 20, 1968. Appellant was convicted, after a jury trial, of manslaughter. The trial judge sentenced him to prison for four to twelve years.

On this appeal Lumpkins challenges the proceedings below in three respects:

1. The jury, could not, on the evidence, find beyond a reasonable doubt (a) that appellant did strike his wife and (b) that the alleged impact did cause her death, and the jury therefore based its verdict not on sufficient evidence but only on surmise and speculation.

2. The trial judge's instruction on second-degree murder was unclear, misleading, erroneous and prejudicial.

3. The trial judge's refusal to instruct the jury on the lesser charge of simple assault was reversible error.

II. <u>The Dramatis Personae</u>

At the time of the alleged homicide, appellant was 52 years old and had been married to the deceased about seven years. During all this period, he had worked continuously for Peoples Drug Store in Silver Spring, Maryland, as a stock clerk and porter. (Tr. 191, 192). His reputation for truth and veracity as well as for peacefulness was very good. He had been a law-abiding person, without a criminal record. (Tr. 225-226, 316). While on bond pending the trial, he continued working. (Tr. 191, 316).

Appellant's wife was about 42 years old, was 5 feet 3 inches tall and weighed 158 pounds. (Tr. 41, 170). Since her marriage to appellant she had never worked. (Tr. 16, 40, 194). She was addicted to excessive drinking of wine during both daytime and evening hours, and was very seldom sober. (Tr. 16, 39, 48, 195, 222, 230). The autopsy showed that her liver had undergone an extensive change or breakdown. The most frequent cause of this condition is chronic alcoholism. (Tr. 172). When she was drunk, she was cross, disagreeable, and argumentative and she nagged and fidgeted. (Tr. 15, 39, 42, 49). During this state of intoxication, Mrs. Lumpkins sometimes had difficulty walking, on some occasions staggering, losing control of her legs, or falling to the ground (Tr. 17, 45-46, 222, 224-225, 230-232) and she would shake if she felt a need for a drink she could not satisfy. (Tr. 45). Rebecca Williams, a beautician and nurse by occupation, and a mother of a 32 year old son, had known appellant and his wife for about five years and had been their landlady for about the last four years. (Tr. 10-11). Mrs. Williams and Mrs. Lumpkins were quite friendly, visited at each other's quarters and were very fond of each other. (Tr. 32, 38). Mrs. Williams testified that Mrs. Lumpkins suffered from some mental illness and acted childishly, like a fourteen or fifteen year old person rather than an adult of over forty. (Tr. 41). She usually slept on the floor at the foot of the bed, lying on a pillow

and bedspread. (Tr. 32).

Appellant and his wife generally had a harmonious, childless marriage. He supported her and treated her kindly, buying for her everything he could afford. (Tr. 15, 22, 40, 194, 200). Appellant seldom drank during the week but did on weekends. On these occasions the couple would often argue, quarrel, scuffle, and bicker with each other. (Tr. 15, 22, 24, 42, 49, 202). On one occasion, about three or four months before her death, appellant smacked her with his hand. (Tr. 24, 203). This was the only time he had hit her. (Tr. 204).

III. The Evidence Relating To The Homicide Charge

The Government's first witness was Mrs. Williams, who was the Lumpkins' landlady. She testified as follows:

On July 19 and 20, 1968, she was operating a rooming house at 1925 North Capitol Street, N. E., in the District of Columbia. She occupied the first floor and the Lumpkins couple rented one of the two rooms on the second floor and Clifford Ryan and James Wilson rented the other. (Tr. 12-24, 43-44, 49).

On Friday, July 19, appellant returned home from work about 6:30 or 7:00 P.M. and proceeded to his one-room apartment. (Tr. 12, 17, 20-21, 43-44, 46-47). He was sober at the time. (Tr. 17, 21). Shortly thereafter, Mrs. Lumpkins returned from a neighborhood liquor store with four bottles of

wine, each containing four-fifths of a quart, and went to her apartment. Just before closing time at 9:00 P.M., she made a second trip to the store and brought back more wine, which she took to her room. (Tr. 17, 19, 49-52).

Appellant and his wife were quiet and orderly until sometime between 11:00 P.M. and midnight when they began to shout, argue, wrangle and apparently scuffle. (Tr. 26, 28, 54, 56-58). During the bickering, Mrs. Lumpkins said she missed an item of clothing and accused appellant of having it. He told her he did not have it and requested her to leave him alone. (Tr. 28, 61-63). During this commotion, Mrs. Williams went from her quarters to the second-floor hall and inquired whether anything was wrong. Mrs. Lumpkins answered in the negative and said that everything was "all right." Mrs. Williams told the Lumpkins couple to stop the noise. They became quiet immediately and Mrs. Williams returned to the first floor. (Tr. 26-29, 53-58). Thereafter, about 12:30 A.M. on July 20, while Mrs. Williams was in her bedroom on the first floor, she heard Mrs. Lumpkins in the second-floor hall shouting, "Oh, my God, please help me." (Tr. 27, 30-31, 57). Mrs. Williams then left her room, went upstairs almost to the second-floor landing and observed that Mrs. Lumpkins had stopped talking, had returned to her room and had closed the door. Mrs. Williams then ordered

appellant and his wife to be quiet and said she would otherwise call the police. (Tr. 27-28, 30-31, 57-61). The shouting having ceased, Mrs. Williams returned to her first-floor bedroom. For a while she heard Mrs. Lumpkins talking and grumbling but did not hear appellant say anything. (Tr. 29-30, 60). Thereafter Mrs. Williams heard no sound in the Lumpkins apartment. (Tr. 30-31, 58, 63).

About 6:00 A.M. next morning, appellant knocked at Mrs. Williams' bedroom door. Appearing to be both sober and calm but confused, he told her that he could not awaken his wife and did not know what had happened. Pursuant to Mrs. Williams' direction that he try again to arouse Mrs. Lumpkins, appellant returned to his apartment and soon came downstairs and said that he could not arouse his wife. (Tr. 30-34). Mrs. Williams then telephoned for both a policeman and an ambulance. (Tr. 35).

The Government's second witness was Clifford Ryan. The following is a statement of his testimony:

At the time of Mrs. Lumpkins' death, Ryan was 17 years old and was a supervisor of a crew of teenagers working on a street-cleaning project. He and James Wilson were renting a room next to the Lumpkins' apartment on the second floor of Mrs. Williams' rooming house. (Tr. 72-74). Ryan had never

spoken to appellant or his wife. He knew each one by sight but not by name. (Tr. 73). From between about 7:00 and 7:30 P.M. on July 19, 1968, until about midnight or a little later, he and his girlfriend were alone in his room. The door was closed and the television set was turned on during some of the time. He did not see either of the Lumpkins on that day. (Tr. 75-76, 81-82, 94).

At about 11:30 P.M., Ryan heard a man and a woman arguing in the Lumpkins' apartment. The woman persisted in demanding something of the man who kept shouting a refusal. (Tr. 76-77, 84). Ryan then, sometime between 12:00 and 12:30 A.M., heard the sound of breaking glass in the adjoining room. (Tr. 79). At the time he thought someone had dropped a glass which fell to the floor and broke. (Tr. 77, 85-87). Next, Ryan heard a woman in the hall outside the door to his room shouting "help". (Tr. 77-78, 86). He thereupon left his room and entered the hall. Finding no one there, he returned to his room and joined his girlfriend. (Tr. 78).

The shouting in the Lumpkins' apartment resumed. (Tr. 77, 84, 88). Then Ryan heard the loud impact of an object against something in the next room, and then the breaking of glass. (Tr. 78-79, 85-89). His impression was that the moving object had struck the wall separating his room from the Lumpkins'

room, or had struck a cabinet or something else in the Lumpkins' apartment. (Tr. 78-79, 85-89). Then, there was complete silence. (Tr. 78). Ryan thereupon escorted his girlfriend home, the time being between midnight and 12:30 A.M. He returned about 2:00 A.M. The door of the Lumpkins' apartment was closed and a man inside was talking. (Tr. 79, 96-97).

Police Officer Smalls Bartly testified as follows:

On Saturday, July 20, 1968, at 6:40 A.M. he responded to a radio call reporting an unconscious person at 1925 North Capital Street. He and an ambulance arrived a few minutes later. (Tr. 98-99, 106). The officer and the ambulance crew proceeded to the Lumpkins' apartment and found on the floor a female later identified as Mrs. Lumpkins. After the ambulance crew examined her, the driver announced that she was dead. (Tr. 99-100, 106). Officer Bartly saw broken glass on the floor and blood on the corpse and on some rags and furniture. He also saw blood on the refrigerator adjacent to the hallway door. (Tr. 100, 106). Officer Bartly talked briefly with appellant, who was then in the first-floor hall. Appellant appeared somewhat intoxicated and his breath smelled of alcohol. (Tr. 100). When asked what had happened, he said that when he awoke, his wife was sleeping on the floor as she sometimes did in hot weather. He tried to arouse her but failed. (Tr. 103). Because the woman had died, Officer Bartly notified his superior

officer and the homicide squad and awaited their arrival. (Tr. 104).

The other police officers called by the Government as witnesses were Clarence J. Day and Stanley D. Alexander. They testified as follows:

Each had been on the force about 16 years. On Saturday morning, July 20, 1968, they were working as detectives assigned to the homicide squad and investigated the death of Betty Lumpkins, wife of appellant. (Tr. 110-111, 152). They arrived at her residence about 7:25 A.M. and made a detailed inspection of her body and apartment.

The building is on the east side of North Capital Street and the apartment is on the front with several windows facing west toward the street. At the head of the steps leading from the first floor to the second is a hallway, and directly to the left is the door to the apartment. A refrigerator was on the right side of and next to the door. There was a double bed with its head adjoining the north wall of the room. On the window-side of the room near the foot of the bed was a five-gallon trash can with its lid in place. (Tr. 116-117, 120, 122, 134). A lawn chair was against the wall directly beneath the windows. The south side of the room contained a pile of trash, papers and bottles. A broom was leaning against the south wall. Another lawn chair was in the southeast corner of

the room. To the north of and next to the refrigerator, between the east edge of the bed and the east wall was a portable television set on the floor. The neck of a broken gallon bottle, with its cap still attached, was on the floor in front of the television set, east of the bed. (Tr. 116, 119, 121-122). The bottom of the bottle was on the opposite side of the room, on the lid of the trash can. (Tr. 116-120, 122, 133-134, 141, 149, 155). Pieces of glass, large and small, some almost pulverized, were scattered throughout the room on the floor, (Tr. 115, 123, 132, 141), and under the bed. (Tr. 123, 134-135). All apparently were from the same bottle. (Tr. 123). West of the bed, near the body of Mrs. Lumpkins, was a pile of clothes. (Tr. 115, 123, 139, 156, 164). Near the broom were three empty fifth-size wine bottles, and a fourth empty wine bottle was under the bed. Also in the room were an empty gallon and a half-gallon wine bottle. (Tr. 116). An electric wire ran across the floor of the apartment. (Tr. 149). The room in general was untidy. (Tr. 115).

Much blood in the form of smears and splatters was in evidence throughout the apartment, particularly on the floor. (Tr. 115, 155). Blood was on the inside of the door, from its knob down to the bottom. (Tr. 142-143, 161). The wall near the light switch had blood smears. (Tr. 116). The front of the refrigerator next to the door had blood stains and smears. (Tr. 116). The chair next to the west wall and the broom in the far corner were covered with blood. (Tr. 116, 122). On the

floor near the head of the body and on the left side and foot of the bed were blood stains. Bloodspots were on the mattress and quilt of the bed. (Tr. 116, 118, 122). There were dark blood stains on the south wall behind the trash can. (Tr. 149).

The nude body of appellant's wife was lying on its back at the foot of the bed. The head, resting on a bedspread, a T-shirt and three pillows, was toward the west and the feet toward the east. Under the body were pieces of broken glass on the floor. (Tr. 112, 114, 154-155). The deceased had four lacerations, one two inches above her right eye about three-fourths of an inch long, another on her right cheek, one on her upper right breast near the armpit, and one on the back of her left hand. She had various bruises, on the side of her left hand, on her legs and other parts of her body. These appeared to be of fairly recent origin. Dried blood was on both the inside and outside of her hands and the upper part of her inner thighs. (Tr. 114, 115, 125, 134-135).

In separate conversations appellant told one or both detectives Day and Alexander that he arrived home from work the previous day between 5:30 and 6:00 P.M., that he and his wife drank about two quarts of wine, that he then went to sleep, that she joined him and began to nag him and shake the bed, that he told her to stop but she continued until she pushed him out of the bed with her knees, that he thereupon drank a "big drink" of wine and told her that if she did not quit shaking

the bed, he would "pop her on the head," that he then returned to bed and went to sleep, that when he awoke the next morning he found his wife lying on the floor and while on his knees in the course of trying to arouse her, he touched her and smeared his hands and trousers with exposed blood, that he did not attempt to clean the room, that he did not know nor remember what happened, that he did not know whether he had hit his wife. (Tr. 123, 126-128, 151, 156-160). Detective Day had the impression, when he talked with appellant on the front porch, that appellant "really was trying to remember" what happened. (Tr. 123, 126-127, 151). The police officers searched the room and appellant for weapons, and they dusted the neck and bottom of the broken gallon bottle for fingerprints. They found no weapons and no usable fingerprints. (Tr. 123, 126-128, 144-145, 151, 155-158).

Dr. Linwood L. Rayford, the last witness for the Government, testified as follows:

He was a duly licensed medical doctor and had been Chief Deputy Coroner for the District of Columbia for eight years. In this capacity he had performed perhaps at least 480 autopsies a year in which he had determined, to a reasonable degree of medical certainty, the course of the deaths in question. (Tr. 168-169).

He performed an autopsy on Mrs. Lumpkins on July 20, 1970. She was about 42 years old, weighed 158 pounds

and was 5 feet 3 inches tall. His external examination showed at least twelve bruises over the entire body, including legs, thighs, arms, anterior chest, scalp and upper abdomen. (Tr. 171, 180, 184). The fresh blood therein indicated they were less than twenty-four hours old. (Tr. 180). Blood was on the body in some places. (Tr. 179). There were superficial lacerations, one an inch below the right eye and one four inches above the right nipple. (Tr. 171, 174, 178). There was a recent 1/4 inch scratch on the dorsal back surface of the left wrist. (Tr. 171). Dr. Rayford found an irregular 3/4 inch laceration two inches above the right eye and two inches to the right of the mid-line. This laceration was about 1/2 to 3/4 inch deep, extending to the bone of the skull. Surrounding it was "very little" bruised skin. (Tr. 170-171, 176, 178, 182-183, 185). Dr. Rayford's internal examination of Mrs. Lumpkins showed that her liver had undergone an extensive fatty degeneration, change or breakdown. (Tr. 172-173, 181). The most frequent cause of this condition is chronic alcoholism. (Tr. 172).

The deep laceration above the right eye was the most vital factor in the autopsy. Being at least 1/2 inch deep, down to bone of the skull, and 3/4 inch long, it could have been caused by a sharp object. (Tr. 186). If a piece of glass caused this cut, it could have been about the same size as the incision itself. (Tr. 177). This 1/2 inch deep laceration

"would have been consistent" with Mrs. Lumpkins' "having fallen flat" on a piece of glass on the floor. This fall would have been as "consistent" a course of the deep cut as would have been a blow to the forehead by a piece of glass. (Tr. 177, 183). All the cuts on Mrs. Lumpkins' face could have resulted from her falling on broken glass on the floor. (Tr. 174). A very hard fall on a piece of glass could have caused this cut, resulting in piercing through the skin to the bone of the skull. (Tr. 174). If Mrs. Lumpkins had fallen to the floor and had struck a piece of sharp glass with considerable force, the impact could have caused such a deep cut. (Tr. 174-175).

The "very little" amount of bruised skin around this laceration indicated the likelihood that Mrs. Lumpkins sustained this injury by falling and striking her forehead against a sharp piece of glass on the floor. (Tr. 183). If she had been hit by a large object sharp enough to cause a cut 3/4 inch long and 1/2 inch deep, then the surrounding area would have had some bruising. (Tr. 182). If a fairly light and small blunt object had struck her and caused such a laceration, there would have been "a large area of bruising about the laceration." (Tr. 183). If Mrs. Lumpkins had fallen with some force and struck a sharp piece of glass on the floor, it could have caused the cut and the slight bruising in the area. Such a fall and impact on a piece of glass was as consistent a cause of the deep cut and slight bruising as was the striking

of Mrs. Lumpkins with an object while she was standing. (Tr. 183).

The deep cut caused massive bleeding. (Tr. 178, 185). Because she was only 5 feet 3 inches tall and weighed 158 pounds, she had more subcutaneous tissue than the ordinary person. The result was that the blood failed to clot but flowed freely out of the laceration and much less than the usual amount of bruising occurred. (Tr. 182, 185). Moreover, Mrs. Lumpkins' scalp had a typical tendency to separate. This factor aided the massive bleeding from the deep cut over the eye. (Tr. 181). No other lacerations on her body caused loss of blood. (Tr. 178). Except for this one deep laceration, the bleeding would have stopped, despite her condition of cirrhosis of the liver and her various minor injuries. (Tr. 181). If the flow of blood had been immediately checked, Mrs. Lumpkins probably would have survived. (Tr. 179, 186). The bleeding certainly could have continued for more than an hour or two. (Tr. 179). While losing blood she could have moved about the room and such movement would have been consistent with the flow of blood from the deep cut. (Tr. 180).

The primary cause of Mrs. Lumpkins' death was hemorrhage and shock resulting from this wound. (Tr. 173).

The cirrhosis of the liver was a secondary factor. A normal liver produces substances which cause the blood to coagulate. It also enables the body to respond to

shock. These two functions are curtailed in a person who has a diseased liver, such as Mrs. Lumpkins had. These facts accounted for her massive bleeding and susceptibility to the shock which followed. (Tr. 173, 185).

Appellant testified in his own behalf. His testimony relating to the homicide charge was as follows:

He arrived home on Friday, July 19, 1968, at 6:30 or 7:00 p.m., after working from 7:30 a.m. to 4:30 p.m. Shortly thereafter he ate something, drank some wine, laid down on the bed in his clothes and went to sleep. (Tr. 195, 202, 206-207). During this period the situation in his apartment was quiet, peaceful and harmonious. (Tr. 196, 221). There was an absence of visible broken glass. (Tr. 211). When he came home, appellant saw in the refrigerator a gallon-size bottle containing water. This was the last time he saw the bottle in its intact, unbroken condition. (Tr. 196, 211).

While appellant was asleep, his wife entered the bed and began to push him with her knees. He awoke and requested her to desist, but she continued to jog him until she forced him out of bed. (Tr. 196, 202). He felt that she was nagging him. He thereupon jumped up from the floor, where he had fallen, and in a loud, angry voice told her that he wanted to go back to sleep and that he would "pop" her if she continued to disturb him. (Tr. 196, 209-210). By "pop" he meant "smack" and he stated that his exact language was:

> "Damn you, you leave me alone. If you do that again, I will smack you." (Tr. 209).

Mrs. Lumpkins' only retort was:

> "Don't ever get in my bed with your clothes on." (Tr. 210).

After this remark, appellant removed his clothes, drank a glass of wine, went to sleep, and awoke the next morning. (Tr. 195, 204, 206). His slumber was heavy and he was completely unconscious. He had no recollection of struggling with his wife, throwing any object at her or hitting her with anything. He did not hear glass breaking or her crying for help. (Tr. 195, 209, 211). If he had, he would have gone to her succor. (Tr. 209).

When appellant awoke in the morning, his wife was not in sight. He arose and began to look for her. The room was in a state of disorder. Blood was on his wife's side of the bed and on his hands. (Tr. 197-205). Much blood was on the floor, walls and refrigerator. (Tr. 212). Broken glass was all over the floor. (Tr. 197, 211). The gallon-size water bottle was in view in a broken condition. (Tr. 211). He found his wife lying on the floor at the foot of the bed. (Tr. 197). Since she appeared to be sleeping, he shook her in order to arouse her. In the course of trying to awaken his wife, he knelt on the floor beside her in blood which became attached to his hands and trousers. (Tr. 214). When she failed to respond, he went to the first floor and

requested the landlady to summon a doctor or ambulance. (Tr. 197, 212). He then returned to his apartment and observed that his wife was lying motionless with her eyes open. (Tr. 197). Concluding that she was dead, he became nervous and went into a state of shock. (Tr. 205, 215). He did not put any blood on the floor, walls, or refrigerator, and he did not try to remove the blood from the room nor did he remember mopping the room after he returned from the first floor. (Tr. 198, 212, 215). He took a spread from the bed and put it over his wife. (Tr. 204-206, 216).

An ambulance attendant and a policeman arrived on the premises simultaneously and went to the Lumpkins' apartment. After a short period, the attendant told appellant that his wife was dead. (Tr. 197, 213). Appellant denied guilt of any wrongdoing. He denied any knowledge of the circumstances leading to and involved in his wife's death. He told the detectives that he did not remember hitting his wife. (Tr. 216-217). He told the Court and jury (a) that he did not hit her in the face with a bottle following an argument; (b) that he did not ever know what happened to her; (c) that he did not know what happened in the apartment, and (d) that he did not think that from the time he came home from work on Friday evening until he awoke the next morning, he was so intoxicated that he did not know what happened. (Tr. 216-217, 219-220).

Herman L. Moffett and Muldro E. Andrews testi-

fied for appellant as follows:

Mr. Moffett had worked thirteen years for the National Mediation Board and had known appellant for twenty-three years and Mrs. Lumpkins for a lesser period. Appellant's reputation for truth and veracity as well as peacefulness and good order was very good. Moffett had seen Mrs. Lumpkins drinking and on one occasion while she was drunk she tried to sit down and fell to the floor. (Tr. 223-226). Mrs. Andrews is appellant's sister. She had worked for the Department of the Army twenty-seven years. She knew appellant's wife and was aware (a) of her daily excessive drinking; (b) her difficulty in moving and walking when drunk, (c) her difficulty of keeping her balance while in this condition and (d) her falling to the ground on occasion while inebriated. (Tr. 230-232).

IV. Aspects of Procedure Involved In Appeal

When the Government rested, appellant moved for a judgment of acquittal. The grounds were that there was no proof of malice and that the Government's evidence was as consistent with the reasonable hypothesis of Mrs. Lumpkins' accidental falling to the floor and sustaining the lethal cut, as the flimsy hypothesis of her being the target of a dangerous object thrown by appellant. (Tr. 188). The Court denied the motion. (Tr. 190). During the discussion among Court and counsel in relation to jury instructions, appellant's counsel requested an instruction on manslaughter and also on simple

assault as a lesser included crime. The Court denied the latter request. (Tr. 261, 263). The judge was loath to give a manslaughter instruction, saying that she did not think there was anything in the case which warranted a manslaughter verdict. (Tr. 253, 256). The prosecutor said (a) he agreed that there had not been any basis for a manslaughter instruction but (b) he deemed the court's giving it to be procedurally wise. The Court concurred. (Tr. 260, 264). Appellant's counsel informed the Court he would be satisfied with the second-degree and manslaughter instructions in the manual. (Tr. 253). After the Court had instructed the jury, counsel stated that he was satisfied. (Tr. 302).

ARGUMENT

I. THE TRIAL JUDGE IMPROPERLY DENIED APPELLANT'S MOTION FOR ACQUITTAL OF THE OFFENSES OF SECOND-DEGREE MURDER AND MANSLAUGHTER.

Appellant went to trial on an indictment charging him with the second-degree murder of his wife by striking her with a bottle. When the Government rested, he moved for a judgment of acquittal on the ground that there was no evidence supporting a homicide charge but that there was evidence pointing to accidental death. (Tr. 188).

The Government's case was entirely circumstantial.

On the record we do not know and we cannot know what happened. If we weigh and credit the testimony of Clifford Ryan, the only witness who heard the commotion in the Lumpkins' apartment, we achieve only an ambiguity of inference. We cannot determine whether the gallon-size water bottle was thrown by appellant at his wife and instead collided with a wall or some other object and broke, crashing to the floor. Neither can we ascertain whether Mrs. Lumpkins, while carrying a full gallon-size bottle of water, dropped it to the floor, where it broke, and then tripped on the electric cord, which ran across the room on the floor, and thus caused her 158 pound body to fall to the floor, and her forehead to strike a piece of sharp glass lying there. Moreover, we cannot decide whether, in her state of intoxication admitted by the prosecutor in his jury argument (Tr. 274), she staggered into something or fell to the floor, thus causing the impact which Ryan testified he heard. And we could to no avail, only guess what happened.

On the record, however, we can draw justifiable inferences of fact which fairly preclude a guilty verdict. Dr. Rayford, the deputy coroner, a physician and surgeon widely experienced in autopsies, testified (a) that the only lethal wound was the deep cut over the forehead and (b) that if this cut was caused by a blow rather than a fall then there would have been a substantial amount of bruised tissue surrounding the laceration. Instead, he found very little bruising. (Tr.

182). Dr. Rayford also testified that the bruise around the lethal cut was equally as consistent with Mrs. Lumpkins' striking her forehead on a piece of glass on the floor as her being hit above the eye by some object. (Tr. 183). In view of the testimony, the Government failed to prove a causal connection between the conduct of appellant and the death of his wife. His conviction of manslaughter, therefore, cannot survive, even if we assume, what the Government did not allege or prove, that appellant inflicted superficial, non-deadly blows on his wife, causing her to enter the hall and cry for help. People v. Mulcahy, 318 Ill. 332, 149 N.E. 266 (1925); Kimmel v. State, 198 Ind. 444, 154 N.E. 16 (1926). The trial judge therefore committed reversible error in permitting the case to go to the jury. There was no evidence which reasonably permitted the finding of guilt of homicide. The conviction must accordingly be vacated. Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d 229, cert. denied, 331 U.S. 837 (1947); United States v. Bush, ____ U.S. App. D.C. ____, ____ F.2d ____, (No. 22, 338 decided August 15, 1969); Powell v. United States, ____ U.S. App. D.C. ____, ____ F.2d ____, (No. 21, 678 decided June 11, 1969); United States v. Skinner, ____ U.S. App. D.C. ____, ____ F.2d ____, (No. 22, 776 decided February 10, 1970).

Furthermore, all the substantial evidence in the case was as consistent with a reasonable hypothesis of innocence of manslaughter. Unlike appellant in United States v. Comer,

____ U.S. App. D.C. ____, ____ F.2d ____, (No. 22, 383 decided January 5, 1970), a case strikingly similar in some respects to the instant appeal, appellant Lumpkins told a plausible and consistent story, even impressing an experienced homicide detective with his apparent sincerity and truthfulness. Unlike Comer, where the lethal weapon was a knife, the instant appeal involves the tenable hypothesis that a fall on a piece of glass rather than a manually delivered blow was the cause of fatal hemorrhage. The customary bizarre character and behavior of Mrs. Lumpkins can easily support a contention of her accidental death, as we have stated above. It is a legitimate inference to be drawn from the evidence. In Carter v. United States, 102 U.S. App. D.C. 227, 252 F.2d 688 (1966) this court at pages 231-232 said:

> This court has held many times that the rule for the jury is that, unless there is substantial evidence of facts which exclude every reasonable hypothesis but that of guilt, the verdict must be not guilty, and that, where all the substantial evidence is consistent with any reasonable hypothesis of innocence, the verdict must be not guilty.

If we should believe all the testimony of the Government's witnesses, we would still have to rely on circumstantial evidence to support an inference that appellant did strike his wife with a bottle and thereby did cause her death. The testimony of Mrs. Williams, Clifford Ryan and the three police officers, however, did not tend to prove this charge. Moreover,

Dr. Rayford testified that a blow by a blunt object on the forehead would have resulted in substantial bruising, rather than the "very little" he found at the deep cut. And appellant categorically denied that he hit his wife with a bottle, the prosecutor failing to weaken his testimony of innocence and ignorance of the circumstances of his wife's death. In United States v. Bush, ____ U.S. App. D.C. ____, ____ F.2d ____, (No. 22, 338 decided August 15, 1969) the court said:

> We hold that on such evidence the jury could not reasonably find that the appellant exceeded the bounds of lawful self-defense. Such a finding must have been based upon speculation, surmise and the repudiation by the government of the case made by its own witnesses.

And on February 10, 1970, the court in Skinner, supra, reaffirmed the doctrine that the Government's case "cannot rest on mere suspicion, conjecture or speculation."

II. THE TRIAL JUDGE IMPROPERLY REFUSED TO INSTRUCT THE JURY ON SIMPLE ASSAULT DESPITE APPELLANT'S TIMELY REQUEST.

When both parties rested, appellant asked for an instruction on simple assault as a lesser included offense. The trial judge denied the request. (Tr. 263). In Logan v. United States, 144 U.S. 263 (1892), the court held that assault is a lesser included offense in an indictment for murder. At page 307 the court said:

> An indictment for a capital offense usually includes an offense less than capital, and the defendant may be con-

> victed of either. For instance, one indicted of murder may be convicted of manslaughter, or of an assault only.

Cf. United States v. Hamilton, 182 F.Supp. 548, 551 (D.C.D.C. 1960). Perry v. United States, ____ U.S.App. D.C. ____, ____ F.2d ____, (No. 21, 936 decided September 15, 1969) was a second-degree murder charge and a conviction of the lesser included offense of assault with a dangerous weapon. The court reversed because of an erroneous instruction. In Comer supra, the court reversed a second-degree murder conviction due to the trial judge's refusal to instruct on manslaughter. In its opinion the court expounded Rule 31(c) of the Federal Rules of Criminal Procedure in relation to guilt of "an offense necessarily included in the offense charged ...". Even though appellant Comer denied that he had stabbed his wife, the court thought that an instruction on a lesser offense was required. In view of the language of Logan, supra, to the effect that assault is a lesser included offense in a murder charge, the trial judge committed reversible error in Lumpkins' trial.

III. THE TRIAL JUDGE'S INSTRUCTIONS ON MALICE AS AN ESSENTIAL INGREDIENT OF SECOND-DEGREE MURDER WERE PLAINLY ERRONEOUS AND POTENTIALLY PREJUDICIAL TO APPELLANT'S SUBSTANTIAL RIGHTS AND THEREFORE REQUIRE REVERSAL.

Appellant complains of certain passages in the trial judge's instruction on second-degree murder. The first reads:

> In determining whether a wrongful act is done with malice, you may infer that a

> person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. (Tr. 298).

The trial judge thus in effect charged that a wrongful act intentionally done is done with malice. Six and a half months before the trial, this court in Green v. United States, ____ U.S. App. D.C. ____, 405 F.2d 1368, 1370 (1969), condemned substantially the same instruction. The court observed that a wrongful act intentionally done is not absolutely done with malice. The court therefore reversed because the definition of malice omitted the element of wilfulness and lack of justification or excuse. The same question was involved in United States v. Wharton, ____ U.S.App. D.C. ____, ____ F.2d ____, (No. 22, 433 decided January 5, 1970) and the court reversed for the same reason. And see United States v. Green, ____ U.S.App. D.C. ____, ____ F.2d ____, (No. 23,003 decided February 19, 1970) where the same question was raised. In addition the trial judge equated malice with "a state of mind showing a heart regardless of social duty." This phrase is misleading, subjective and ambiguous. See United States v. Bush, ____ U.S. App. D.C. ____, ____ F.2d ____, (No. 22,338 decided August 15, 1969). On the record, we do not know whether the jury was swayed by these erroneous instructions. Cf. Wharton, supra. By thus submitting the case, the trial judge in effect told the jury that on the evidence "a reasonable mind might fairly conclude guilt beyond a reasonable doubt" and that the jury should decide whether it did. See Curley and Powell,

supra. Although the jury acquitted appellant Lumpkins of second-degree murder, it might easily have been at least subconsciously affected by the trial judge's invalid instructions on malice. The doubt is strong enough to warrant the conclusion that the plain instructional errors require reversal of appellant's manslaughter conviction in the interests of justice. Wharton, supra, and United States v. Bryant, ____ U.S. App. D.C. ____, ____ F.2d ____, (No. 22,511 decided December 11, 1969).

CONCLUSION

For the reasons stated, this court should reverse the conviction. Depending on the basis for reversal, the District Court should be instructed to enter a judgment of acquittal, or to order a new trial.

Respectfully submitted,

MILTON A. KALLIS

JOHN H. TREANOR, JR.
Attorneys for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,503

UNITED STATES OF AMERICA, APPELLEE

v.

LOUIS LUMPKINS, APPELLANT

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 31 1970

Nathan J. Paulson
CLERK

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
DANIEL BARUS,
GREGORY C. BRADY,
Assistant United States Attorneys.

Cr. No. 1351-68

INDEX

	Page
Counterstatement of the Case	1
Argument:	
I. The evidence was sufficient for a reasonable person to conclude that appellant was guilty beyond a reasonable doubt of manslaughter	19
II. Appellant was not entitled to an instruction on simple assault as a lesser included offense since there was no evidence to justify the giving of this charge	23
III. The trial court's instruction on the element of malice of second-degree murder does not warrant reversal of appellant's conviction for manslaughter	25
Conclusion	26

TABLE OF CASES

**Belton* v. *United States*, 127 U.S. App. D.C. 201, 382 F.2d 150 (1967)	24
Brooke v. *United States*, 128 U.S. App. D.C. 19, 385 F.2d 279 (1967)	24
Carter v. *United States*, 102 U.S. App. D.C. 227, 252 F.2d 608 (1957)	19
**Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967)	19
**Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947)	19
Green v. *United States*, 132 U.S. App. D.C. 98, 405 F.2d 1368 (1968)	25, 26
**Holland* v. *United States*, 348 U.S. 121 (1954)	20
**Howard* v. *United States*, 128 U.S. App. D.C. 336, 389 F.2d 287 (1967)	19, 25
**Hunt* v. *United States*, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963)	20
**Johnson* v. *United States*, D.C. Cir. No. 21,851, decided March 23, 1970 (*en banc*)	22
Levin v. *United States*, 119 U.S. App. D.C. 156, 338 F.2d 265 (1964), *cert. denied*, 379 U.S. 999 (1965)	25
**MacIllrath* v. *United States*, 88 U.S. App. D.C. 270, 188 F.2d 1009 (1951)	24
Miranda v. *Arizona*, 384 U.S. 436 (1966)	10
**Sansone* v. *United States*, 380 U.S. 343 (1965)	23
Sparf v. *United States*, 156 U.S. 51 (1895)	23
Thompson v. *United States*, 132 U.S. App. D.C. 38, 405 F.2d 1106 (1968)	19, 20

Page

Cases—Continued

United States v. *Comer*, —— U.S. App. D.C. ——, 421 F.2d 1149 (1970) 23

United States v. *Green*, —— U.S. App. D.C. ——, 424 F.2d 912 (1970) 25, 26

United States v. *Wharton*, D.C. Cir. No. 22,433, decided January 5, 1970 ..... 25, 26

**Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950) 25

OTHER REFERENCES

Rule 30, FED. R. CRIM. P. 25

Rule 31(c), FED. R. CRIM. P. 23

JUNIOR BAR SECTION OF DISTRICT OF COLUMBIA BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA (1966) 19, 25

MODEL PENAL CODE § 1.07(5) (1962) 24

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Was the evidence sufficient for a reasonable person to conclude that appellant was guilty beyond a reasonable doubt of manslaughter?

II. Whether appellant was entitled to an instruction on simple assault as a lesser included offense when there was no evidence to justify the giving of this charge.

III. Whether the trial court's instruction on the element of malice of second-degree murder warrants reversal of appellant's conviction for manslaughter.

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,503

UNITED STATES OF AMERICA, APPELLEE

v.

LOUIS LUMPKINS, APPELLANT

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was the husband of Betty Lumpkins. The two of them resided in a rooming house on North Capitol Street, N.E., on July 19, 1968. Sometime either in the late evening hours of July 19 or in the early morning hours of July 20, Mrs. Lumpkins sustained a deep laceration on her forehead from which she bled to death in their one-room apartment. Appellant was the only person with Mrs. Lumpkins in the apartment during this time. In a one-count indictment filed August 26, 1968, appellant was charged with murder in the second-degree. Appellant's trial by jury in the District Court before Judge

June L. Green began on May 12, 1969. After a three-day trial, the jury on May 15 returned a verdict of guilty of manslaughter. Appellant was sentenced to a term of imprisonment of four to twelve years on June 27, 1969. This appeal followed.

The first witness for the Government at appellant's trial was Rebecca Williams, who operated the rooming house at 1925 North Capitol Street, N.E., on July 19 and 20, 1968, where appellant and the deceased lived. Mrs. Williams occupied the first floor of this house, and Mr. and Mrs. Lumpkins rented one of the two rooms on the second floor. The other room, which was adjacent to the Lumpkinses' room, was occupied by two young men, Clifford Ryan and James Wilson (Tr. 10-24, 43-44, 49-50).[1]

Mrs. Williams testified that she had known appellant for about ten years and that she had first met Mrs. Lumpkins about five years ago (Tr. 11). The Lumpkinses and Mrs. Williams had been fellow tenants at a rooming house at 1429 W Street, N.W., for about three or four years. They all moved to the house on North Capitol Street in April or May of 1968 (Tr. 10-12). The Lumpkinses had no children, and Mrs. Lumpkins did not work (Tr. 40, 42). Mrs. Williams stated that Mr. and Mrs. Lumpkins generally got along fine together until they started drinking, at which point "they would argue and talk and discuss and fret around" (Tr. 15, 42). She said they would argue and scuffle about every week as they drank together (Tr. 25). Mrs. Williams said she had never seen either of them strike the other in her presence, but did observe that Mrs. Lumpkins had been hit after one of their quarrels. This occurred about one month after they moved to North Capitol Street. Appellant told Mrs. Williams that he had struck Mrs. Lumpkins, and he took her to the hospital in Mrs. Williams' car (Tr. 15-16, 24). Mrs. Williams also said she saw

[1] Mrs. Williams' thirty-two-year-old son was the sixth person who lived in this house. He lived on the third floor (Tr. 42-44).

Mrs. Lumpkins bleeding quite a bit from either the hand or the head one morning when they lived on W Street, but Mrs. Williams never learned what had happened (Tr. 25-26).

Mrs. Williams indicated that she and the Lumpkinses were close friends, and she would visit with them frequently (Tr. 31-32, 38). Mrs. Lumpkins was a heavy wine drinker and would drink "every day and every night" (Tr. 16, 38-40). She drank "as much as she could get" (Tr. 39). Mrs. Williams said that Mrs. Lumpkins "was very cross and fussing and nagging and drinking just like people do that drink a whole lot" (Tr. 39). Mrs. Lumpkins would shake if she needed a drink (Tr. 45). Sometimes she would stagger when she was drinking (Tr. 17, 46), but Mrs. Williams said she never knew of anything wrong with her legs, nor had she ever known Mrs. Lumpkins to faint, fall down or injure herself by bumping into things while she was drinking (Tr. 44-46). Mrs. Williams described Mrs. Lumpkins as "childish," and although she was about forty years old, she acted as if she were only fourteen or fifteen (Tr. 41). Mrs. Lumpkins usually slept in the middle of the floor on a spread and pillow (Tr. 31-32). Mrs. Williams stated that appellant drank on the weekends, but seldom during the week (Tr. 16).

Mrs. Williams testified that appellant returned home from work at about 6:00 P.M. on Friday, July 19, 1968, and proceeded to his second floor one-room apartment (Tr. 12, 17, 20-21, 43-44, 46-47). Appellant was sober (Tr. 20-21). About ten minutes later Mrs. Lumpkins came downstairs and went to a nearby liquor store (Tr. 17, 48). She did not appear to Mrs. Williams to have been drinking (Tr. 17-19).[2] Mrs. Lumpkins returned

---

[2] However, Mrs. Williams later testified that although Mrs. Lumpkins did not appear to have been drinking at that time, she probably had had something to drink because she usually drank every day. In addition, Mrs. Williams said that Mrs. Lumpkins was happy and laughing and that she usually was sick if she had not had anything to drink. Nevertheless, she did not appear to be under the influence (Tr. 48-49).

from the liquor store between 6:30 and 7:00 P.M. with four bottles of wine, each containing four-fifths of a quart, and went to her apartment (Tr. 17, 20, 49, 52). Mrs. Lumpkins made a second trip to the liquor store shortly before 9:00 P.M. and returned with more wine, but Mrs. Williams did not notice how many additional bottles she had purchased (Tr. 49-52).

The Lumpkinses were quiet and orderly that evening until sometime between 11:00 P.M. and midnight, at which time Mrs. Williams heard them shouting, arguing and apparently scuffling (Tr. 26, 28, 53-54, 56-58). It seemed to Mrs. Williams that they were arguing about an article of clothing which Mrs. Lumpkins accused appellant of having. He told her that he did not have it and further told her to leave him alone (Tr. 28, 61-63). Mrs. Williams left her first-floor apartment, went halfway up the stairs to the second floor and asked if there was anything wrong. Mrs. Lumpkins replied that there was not, and Mrs. Williams told both of them to stop the noise. They became quiet immediately, and Mrs. Williams returned to her apartment (Tr. 26-29, 53-58). However, between 12:30 and 1:00 A.M., Mrs. Williams heard Mrs. Lumpkins in the second-floor hallway shouting, "Oh, My God, somebody please help me" (Tr. 27-31, 57-59). Mrs. Williams again left her apartment and ascended halfway up the stairs to the second floor, whereupon she noticed that Mrs. Lumpkins had returned to her apartment and had closed the door. Then Mrs. Williams ordered the Lumpkinses to be quiet or else she would call the police (Tr. 27-31, 57-61). They became quiet again, and Mrs. Williams returned to her apartment. Mrs. Williams heard Mrs. Lumpkins talking again for a while, but then she heard nothing more (Tr. 29-31, 60-61). Mrs. Williams heard no further sounds from the Lumpkins apartment throughout the remainder of the night (Tr. 30-31, 58, 63).

At about 6:00 o'clock the next morning appellant knocked on Mrs. Williams' door and told her that he could not awaken his wife. Appellant did not seem to be nerv-

ous but was calm and sober. Thinking that Mrs. Lumpkins was probably only drunk, Mrs. Williams told appellant to go back to his room and try to wake her again. However, he returned and told Mrs. Williams that he could not arouse her. Then Mrs. Williams summoned the police and an ambulance (Tr. 30-35).

At the time of this offense, Clifford Ryan was seventeen years old and he was the supervisor of a group of teenagers who were conducting a street-cleaning project for Pride, Inc.. He and another young man, James Wilson, were renting the room adjacent to the Lumpkins apartment on the second floor of Mrs. Williams' rooming house. The two apartments were separated by a wall with a wooden door in the center which was always kept closed. Mr. Ryan knew both of the Lumpkinses on sight, but he had never spoken to them (Tr. 72-75).

On July 19 Mr. Ryan returned to his room from work with his girl friend between 7:00 and 7:30 P.M.. They were alone in his room until about midnight with the door closed and the television set on part of the time. Ryan did not see either of the Lumpkinses on that day (Tr. 75-76, 81-82, 94). At about 11:30 P.M. Mr. Ryan heard the Lumpkinses arguing in their apartment (Tr. 76). Apparently Mrs. Lumpkins was seeking to persuade appellant to do something, but he kept shouting his refusal Tr. 76-77, 84). Then between 12:00 and 12:30 A.M. Mr. Ryan heard the sound of breaking glass in the Lumpkins apartment, and he thought at the time that someone had dropped a glass which broke on the floor (Tr. 77, 79, 85-87). Next he heard Mrs. Lumpkins in the hallway shouting, "Help" (Tr. 77-78, 86). He ignored her cries at first, but later he went out into the hallway only to find that no one was there, and he returned to his room (Tr. 77-78).

The argument in the Lumpkins apartment continued, and then Mr. Ryan heard the loud impact of an object against something in the next apartment, followed by the sound of breaking glass (Tr. 78-79, 85-89). He thought at the time that a moving glass object had struck some-

thing like the wall or a cabinet and broken and that its pieces had fallen to the floor (Tr. 78-79, 85-89).[3] Thereafter there was complete silence in the neighboring apartment (Tr. 78). Later Mr. Ryan took his girl friend home. He was gone about one hour, returning about 2:00 A.M. (Tr. 79, 94-95). The door of the Lumpkins apartment was closed. Mr. Ryan could hear a man talking

---

[3] Mr. Ryan explained this second sound of glass breaking on cross-examination as follows:

Q: And what did that [glass breaking] sound like?
A: Sounded something like throwed it or hit something.
Q: Why did it sound like that?
A: I am no authority on broken glass but glass that is broken, you drop a piece of glass, there is a difference than when you strike something with greater impact. You hear the sound before—before it hits the floor.
Q: I am sorry. Say that again.
A: You can hear the impact before it hits the floor or ground—strike a piece of glass.
Q: When you strike a piece of glass?
A: When you struck it against anything.
Q: Well now the first sound of glass I think you have said sounded as if something—
A: Had been dropped.
Q: Had been dropped?
A: Yes.
Q: You mean to the floor?
A: Yes.
Q: And the second sound—this was after she apparently hollered "help" outside in the hall?
A: Yes.
Q: Sounded again like what?
A: Somebody struck it or threw it.
Q: Well, is this the object against the wall that you were talking about?
A: Yes. I think—that is when it came either against the wall or maybe a cabinet, something like that.
Q: Did it sound as if it were hitting something wooden?
A: I couldn't say. It was loud.
Q: You couldn't say whether it sounded as if it were something wooden or not?
A: I couldn't say was it wood or not.
Q: You said it sounded as if it might have hit the wall or cabinet. Did you say that?
A: Yes, something like that. (Tr. 87-89.)

inside, but he could hear no other voice (Tr. 79-80, 96-97).[4]

Officer Smalls Bartly of the Metropolitan Police arrived at the rooming house a few minutes after 6:40 A.M. on July 20 in response to a radio run for an unconscious person (Tr. 98-99). The officer was escorted to the Lumpkins apartment on the second floor, where he observed the body of a female later identified as Betty Lumpkins (Tr. 99-100). He was advised by the ambulance crew that she was dead (Tr. 105-106). The officer proceeded no farther than the door to the apartment, but he noticed that there was blood all over Mrs. Lumpkins' body and on some furniture and rags (Tr. 100, 105-107). There was also glass on the floor (Tr. 106-107). He then secured the premises and summoned the officials of the Homicide Squad (Tr. 103-104).

Officer Bartly briefly spoke to appellant in the first floor hallway after calling the Homicide Squad (Tr. 100). In the officer's opinion, appellant was "somewhat intoxicated" at the time, a "little shaky," and his breath smelled of alcohol (Tr. 101). Officer Bartly asked appellant what had happened. Appellant told him that when he awoke he noticed his wife on the floor, where she sometimes would sleep in hot weather, and attempted to arouse her, but when he failed he sought help (Tr. 103). The officer conducted no further investigation (Tr. 104-105).

The Government also presented the testimony of Detectives Clarence J. Day and Stanley D. Alexander, the two officers from the Metropolitan Police Homicide Squad who conducted the investigation of the death of Betty Lumpkins. The two officers had both been on the police force for about sixteen years. They arrived at the room-

---

[4] Mr. Ryan testified that he could not hear what the man in the Lumpkins apartment was saying. Mr. Ryan stated, "Well, I heard a man talking but he didn't get no reply at all, no answer" (Tr. 79-80).

Although Mr. Ryan said he could not be certain about it, it sounded as if the Lumpkins were drinking in their apartment the night of this offense (Tr. 80-81).

ing house at about 7:25 A.M. on July 20, 1968, (Tr. 110-111, 152), and conducted a detailed inspection of Mrs. Lumpkins' body and the apartment.

The building was on the east side of North Capitol Street, and the apartment was on the front with several windows facing west toward the street. At the head of the steps leading from the first floor to the second was a hallway, and directly to the left was the door to the apartment. A refrigerator was on the right side of and next to the door. There was a double bed with its head adjoining the north wall of the room. On the window side of the room near the foot of the bed was a five-gallon trash can with its lid in place (Tr. 116-117, 120, 122, 134). A lawn chair was against the wall directly beneath the windows. The south side of the room contained a pile of trash, papers and bottles. A broom was leaning against the south wall. There were three empty fifth-size wine bottles near the broom, and a fourth empty wine bottle was found under the bed. The officers also found in the room an empty gallon wine bottle and an empty half-gallon wine bottle (Tr. 117). Another lawn chair was in the southeast corner of the room. To the north of and next to the refrigerator, between the east edge of the bed and the east wall, was a portable television set sitting on the floor. The room in general was untidy (Tr. 115-119, 121-122). The neck of a broken gallon bottle, with its cap still attached, was on the floor in front of the television set (Tr. 116, 119, 121-122). The bottom of the bottle was on the opposite side of the room on the lid of the trash can (Tr. 116-120, 122, 133-134, 141, 149, 155). The police were not able to obtain any usable fingerprints from the neck of this bottle (Tr. 144). There was blood on the wall behind the trash can (Tr. 149). Pieces of glass of varying sizes were scattered throughout the room on the floor. Some of these pieces were very small (Tr. 115, 123, 132-135, 141). Most of them appeared to be from the same bottle, but Detective Day was not positive of this (Tr. 123, 134). "There were smears of blood on the floor and near the decedent's head

there was a large pile of clothes and they were very heavily soaked with blood" (Tr. 115-116, 123, 139, 156, 164). The bed had been neatly covered with a quilt or bedspread (Tr. 117) There were spots of blood on the side of the bed and mattress (Tr. 147). The door leading to Mr. Ryan's apartment was locked (Tr. 143-144).

The officers indicated that there was a large quantity of blood throughout the room in the form of splatters and smears, particularly on the floor (Tr. 115, 155). The lawn chair and the broom were covered with blood (Tr. 116, 122). There were blood stains and smears on the refrigerator (Tr. 116). In front of the refrigerator there was a brown shoe, and the mate to this shoe was found near Mrs. Lumpkins' head. Both of these shoes had blood on the inside of them as well as on the outside (Tr. 116). There was blood on the inside of the hallway door. (Tr. 142-143, 161). The light switch and the wall surrounding it were smeared with blood (Tr. 116, 143). The officers observed no blood in the hallway (Tr. 143).

Mrs. Lumpkins' nude body was lying on its back at the foot of the bed. It was covered with a blue bedspread (Tr. 111-114). Her head was toward the west and her feet toward the east (Tr. 112). The upper part of her body and head were resting on three pillows, and there were also a bedspread and T-shirt under her (Tr. 114). There were pieces of broken glass on the floor under the lower portion of the body which were noticed when it was moved (Tr. 123). Detective Day did not observe any glass on top of the body (Tr. 139). These pieces of glass under the body indicated to Detective Day that the "glass was there before the body laid there" (Tr. 137-138). The pile of blood-soaked clothing near Mrs. Lumpkins' head gave Detective Alexander the impression that someone had made an effort to clean up the blood in the room (Tr. 155-156). There was some glass entangled in this bundle of clothing (Tr. 139). Detective Day observed four lacerations on Mrs. Lumpkins' body: one laceration two inches above her right eye which was about three-quarters of an inch long, another on her right cheek, one

on her upper right breast near the armpit, and one on the back of her hand. There was dried blood and various bruises over her body of apparent recent origin (Tr. 114-115, 125, 134-135).

Appellant spoke to Detectives Day and Alexander separately and at different times[5] on July 20. Detective Day spoke to appellant on the front porch of the rooming house during the crime-scene investigation. His recollection of this conversation was that appellant told him that he returned home about 5:00 or 6:00 P.M. on July 19, that he gave his wife some money and that he had a couple of drinks and went to bed around 9:00 P.M. His wife was sitting in a chair reading at the time. He awoke at 6:00 A.M. when his hand touched something cold, and he realized it was blood. He found his wife lying at the foot of the bed (Tr. 127). Appellant told him that he did not remember what had happened. Detective Day said there was a strong odor of alcohol about appellant at the time, and there was blood on his pants. There was also blood on his hands and dried blood under his fingernails, and he had a small laceration on the back of his left hand. Appellant explained that he had encountered the blood attempting to awaken his wife. Appellant told Detective Day that he did not know whether he hit his wife or not (Tr. 128, 150-151). Detective Day said appellant gave him "the impression that he was really trying to remember" (Tr. 151).

Detective Alexander spoke to appellant in greater detail at about 10:15 A.M. at the Homicide Squad office. Appellant said that when he arrived home he gave his wife ten dollars for a television payment and an additional two dollars to buy wine. She went out and returned with two quarts of wine which they drank. He then lay on the bed with his clothes on and she told him to remove them, which he did. He returned to bed, but

---

[5] Both officers testified that they advised appellant of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), prior to these conversations (Tr. 125-126, 157-158).

Mrs. Lumpkins later got in bed nude and began "picking" on him, asking him where he had been (Tr. 158). She began to shake the bed; he told her to stop, but she persisted until she pushed him out of bed with her knees. He took a "big drink" of wine and told her if she did not quit shaking the bed, he would "pop her on the head" (Tr. 158-160). He returned to bed and went to sleep, only to awaken in the morning and find his wife's body at the foot of the bed. Appellant told Detective Alexander that he made no attempt to clean up the apartment (Tr. 159). Appellant also told Detective Alexander that he did not remember whether he had struck his wife (Tr. 160).

Dr. Linwood L. Rayford, Chief Deputy Coroner of the District of Columbia, was the last witness for the Government. He performed an autopsy on Mrs. Lumpkins' body on July 20, 1968 (Tr. 168-170). She was 5 feet 3 inches tall, weighed 158 pounds and was about 42 years old (Tr. 170). The doctor's external examination showed at least twelve bruises over her entire body, including legs, thighs, arms, anterior chest, scalp and upper abdomen (Tr. 171, 180, 184), which were less than twenty-four hours old (Tr. 180).[6] Dr. Rayford found several superficial lacerations on Mrs. Lumpkins' body as well. There was one located one inch below the right eye which was one-half inch in length (Tr. 171). There was another one-inch laceration on her right anterior chest, about four inches above the right nipple of her breast (Tr. 171).[7] There was also a one-quarter inch scratch on the dorsal surface of her left wrist (Tr. 171). Dr. Rayford also noted an irregular three-quarters inch laceration located about two inches above the right eye and two inches to the right of the midline (Tr. 171). This laceration was about one-half to three-quarters of an inch in depth, extending to the bone of the skull (Tr. 171,

---

[6] Dr. Rayford said he stopped counting after he had found twelve bruises on her body (Tr. 184).

[7] Dr. Rayford said that this laceration was so superficial that it could have been caused by a sharp fingernail (Tr. 174).

176, 178).[8] Dr. Rayford's internal examination of Mrs. Lumpkins showed that her liver had undergone an extensive fatty change or breakdown—a fatty degeneration (Tr. 172, 181). The doctor explained that the most common cause of this condition in the District of Columbia is chronic alcoholism (Tr. 172).[9]

Dr. Rayford stated that in his opinion, the cause of Mrs. Lumpkins' death was "hemorrhage and shock, secondary to the laceration of the forehead, and as a contributing factor, the fatty liver" (Tr. 173).[10] Simply stated, Mrs. Lumpkins bled to death from the laceration on her forehead (Tr. 184-185).[11] The doctor could not estimate precisely how long it took her to lose the amount of blood she did. It could have taken two hours, but at least more than one hour (Tr. 179).[12]

Dr. Rayford said that in his opinion the laceration on Mrs. Lumpkins' forehead and the other cut on her face were consistent with her having been struck in the face with a bottle which broke at the time of striking (Tr. 173-174). The doctor said these lacerations to her face

---

[8] Dr. Rayford testified that he did not find any cuts on Mrs. Lumpkins' back (Tr. 175).

[9] Dr. Rayford was not able to present the results of a blood-alcohol test which was presumably done at the time of the autopsy. The results or the blood sample were apparently lost (Tr. 175-176, 180-181).

[10] Dr. Rayford described Mrs. Lumpkins' liver condition as cirrhosis (Tr. 181). He explained that this condition contributed to her death by loss of blood in two ways:

> (1) a person with a fatty liver does not respond to shock as well as a normal individual, and
>
> (2) the liver produces certain substances which help the body to coagulate blood, and an individual with a fatty liver has an increased tendency to bleed because the production of these substances is diminished (Tr. 173).

[11] Dr. Rayford testified that he could not find anything to indicate that Mrs. Lumpkins bled to death from any other source than the three-quarter inch laceration over her eye (Tr. 178-179, 185).

[12] Dr. Rayford said that it was unlikely that Mrs. Lumpkins would have died from this wound had she received prompt medical attention (Tr. 179, 185-186).

were consistent with the theory that she fell on her face on some glass on the floor, but she would have had to hit the glass with her forehead with "considerable" force to sustain such a deep laceration (Tr. 174-175, 177). There was "very little" bruising around the wound on her forehead (Tr. 182). If she had been struck by a "flying object" sharp enough to cause this deep a laceration, the area around the laceration would show some bruising (Tr. 182). A fairly light and blunt object which would cause this laceration would give a large area of bruising about the laceration (Tr. 182-183). The bruising around the laceration on her forehead was as consistent with her striking her head on glass on the floor as being struck by something (Tr. 183). However, Dr. Rayford later indicated that the blood flowed freely from this wound, and for that reason it did not bruise as much as a wound where the blood did not escape from the traumatized tissue (Tr. 182, 185). Furthermore, she had more subcutaneous tissue than the ordinary person. Her scalp also had a typical tendency to separate, and these factors would increase the bleeding and reduce the bruising (Tr. 181-182, 185).

Dr. Rayford also said that he could not say how large a piece of glass it was that caused the major laceration. It could have been the size of the wound itself (Tr. 177). There were no particles of glass adhering to the wound (Tr. 177). The doctor was not able to say whether the blow to the head which caused the laceration, whatever its source, would have rendered Mrs. Lumpkins unconscious (Tr. 185). She could have moved about the room after sustaining this wound. There was nothing about this wound or the way it was suffered inconsistent with movement about the room whereby she could have left blood throughout the apartment (Tr. 179-180). Finally, Dr. Rayford could not say what type of substance caused this laceration. It could have been "metal, tin, uranium, gold, [or] glass," or indeed anything sharp (Tr. 186).

The Government rested its case at the conclusion of Dr. Rayford's testimony (Tr. 187). Appellant made a

motion for a judgment of acquittal on the grounds that there was no proof of malice and that the Government's evidence that he struck his wife in the head with a bottle was as consistent with the theory that she cut her head from an accidental fall on a piece of glass while intoxicated (Tr. 188-189).[13] The court denied the motion (Tr. 190).

Appellant testified in his own behalf. He testified that he had been employed as a porter and stock clerk at a Maryland drug store since 1957 (Tr. 191). A doctor advised him about five years ago to refrain from "strong drink" (Tr. 192). He stopped drinking liquor after that, but he was later told by the same doctor that he could drink a small amount of wine or beer, which he did at the time of this offense (Tr. 193). He said that his wife did not drink that much when they were first married, which he thought was about eight years prior to the time of his trial, but she had been drinking more the past four or five years (Tr. 192-194). Their relationship was harmonious (Tr. 194).

Appellant testified that he arrived home on July 19 at about 6:30 or 7:00 P.M. He proceeded to his apartment, had something to eat, took a drink of wine and went to sleep on the bed. His wife was drinking that evening and had been drinking before he got home, as was her usual habit (Tr. 195). That evening he observed in the refrigerator a gallon-size bottle containing water where it was usually kept (Tr. 196). This was the last time he saw this bottle in an unbroken condition (Tr. 196-197).

Appellant got up from the bed later in the evening, removed his clothes, had another glass of wine and then returned to bed (Tr. 195). He had only two small glasses or cups of wine that evening and nothing more (Tr. 195). He did not remember whether his wife went out to get some wine (Tr. 195). He did not have an argument with Mrs. Lumpkins before he went to bed (Tr.

---

[13] Appellant's counsel also indicated that he was addressing his motion to the crime of manslaughter (Tr. 188).

195-196). He had no words with her that evening until she awoke him. When she did so, he asked her to leave him alone, and when she persisted, he told her he "was going to pop her if she didn't leave me alone, so I didn't hear no more" (Tr. 196). He did not remember getting into any struggle with her, or throwing anything at her, or striking her with anything (Tr. 196).

When appellant woke up the next morning, he turned over and felt something cold on the side of the bed. He looked at it and saw that it was blood. He observed a lot of glass on the floor as he got up to look for Mrs. Lumpkins. He walked around the bed and discovered her lying on the floor. He attempted to arouse her, but when he was unsuccessful he went downstairs to ask Mrs. Williams to summon an ambulance or the police. However, Mrs. Williams was of the impression that Mrs. Lumpkins probably had too much to drink, and she sent him upstairs to try again. He returned to Mrs. Williams' apartment and told her, "No, her eyes are open. She can't be drunk, or asleep" (Tr. 197). Appellant did not remember whether he mopped up any of the blood on the floor or whether he put the spread back on the bed (Tr. 198).

On cross-examination appellant said that he did not remember his wife going out to buy wine the evening of July 19 (Tr. 201). He admitted that he and his wife did have arguments sometimes (Tr. 202). Mrs. Williams was mistaken, he said, when she testified that he told her he struck his wife a month before her death because she actually only bumped her head that time (Tr. 202-203). He did strike his wife when they lived on W Street, but only with his hand, and Mrs. Williams he said was again mistaken when she testified that Mrs. Lumpkins was bleeding from her hand or head after that incident (Tr. 203). He never struck his wife except for that occasion on W Street (Tr. 203-204).

Appellant said that nothing occurred on July 19 to make him particularly weak or over-tired but that he did go to bed that evening at 7:00 P.M. (Tr. 202). He did not remember what happened that night except when Mrs.

Lumpkins kicked him out of bed for wearing his clothes in bed (Tr. 202). He did have a drink of wine then and returned to bed (Tr. 204), but he had only two glasses of wine that night (Tr. 206-207). He said the odor of alcohol the detective smelled must have come from these two glasses (Tr. 207).

Appellant said he did not get angry when his wife kicked him out of bed, but it did make him "excited" (Tr. 208). He merely told her that if she did it again or refused to leave him alone he would "pop" her, which meant he would "smack" her (Tr. 204, 209). He stated that he told her, "Damn you, you leave me alone. If you do that again I will smack you" (Tr. 209), to which she replied, "Don't you ever get in my bed with your clothes on" (Tr. 210). He told his wife he wanted to sleep, and she said nothing more to him after this. He soon went to sleep (Tr. 204, 210). He did feel somewhat that his wife was nagging him, but these were the only angry words between them that evening (Tr. 209-210). He did not recall at what time this exchange occurred (Tr. 210). He did not hear his wife shouting for help in the hallway or demanding that he return her blouse because he was asleep (Tr. 209-210).

Appellant testified that he did not see any broken glass or bottles when he arrived at his apartment that evening, and he did not hear any glass breaking during the night (Tr. 210-211). He said he usually had sheets, blankets and a bedspread on the bed, and there were two sheets and a blanket on the bed when he went to sleep that evening (Tr. 204). He acknowledged that a photograph of the bed which was taken at the time of the police investigation and introduced at trial did not show any bed clothes over the mattress, but he said he did not know what happened to the sheets and blankets (Tr. 205, 215-216). He could have thrown the bedspread over the bed after discovering his wife's body, but he did not remember because he was so nervous at the time (Tr. 215).

Appellant reiterated how he awoke the next morning, felt something cold on his wife's side of the bed which he saw was blood, saw glass on the floor and blood on the floor, walls and refrigerator, found his wife on the floor and went to Mrs. Williams' apartment for help when he could not arouse his wife (Tr. 211-212). He said that he got blood on his hands and trousers from kneeling beside his wife's body while attempting to awaken her (Tr. 214).

Appellant remembered telling Detective Alexander at the station house that he did not remember hitting his wife (Tr. 216). He did not know at the time what had happened to his wife, and he still did not know at the time of his trial (Tr. 216). He did not believe that he was so intoxicated that he could not remember what happened in the room that night (Tr. 217). He did not hear anything at all unusual that night (Tr. 219). In addition, he did not hear a man talking in his apartment at about 2:00 A.M., and the male voice which Mr. Ryan heard was not his (Tr. 219-220). Cross-examination of appellant was concluded after he denied that he and his wife had a long argument that night following their drinking of a substantial quantity of wine, which culminated in appellant's striking her in the face with a bottle (Tr. 220-221).[14]

Herman Moffett testified that he had known appellant for twenty-three years and that he was married to appellant's sister (Tr. 223). He knew Mrs. Lumpkins and said she drank "a little" (Tr. 224). He saw her drinking at a party about five or six years ago (Tr. 224-225). She became intoxicated and fell as she attempted to sit down (Tr. 224-225), but he did not believe she was injured in this fall (Tr. 225).

Mr. Moffett said that appellant's reputation for truth and veracity and peace and good order among the people

---

[14] Appellant testified on redirect examination that his wife once fell while drinking and cut her head when they were living on W Street. Appellant also stated that his wife told him her legs would "give way" on her sometimes (Tr. 221-222).

in his neighborhood and his circle of friends was "very good" (Tr. 225-226). On cross-examination, however, Mr. Moffett admitted that his knowledge of appellant's community reputation was based primarily on those people who knew appellant eight to nine years ago when he lived on California Street (Tr. 226-227). He further stated that the last occasion he had discussed appellant's reputation for truthfulness with someone was about five years ago (Tr. 227-228). He said he was aware that appellant was told by his doctor about two or three years ago to stop drinking so heavily (Tr. 228). He had seen appellant intoxicated about two or three times, but he had never seen appellant strike Mrs. Lumpkins or know that he had done so (Tr. 229).

Muldro Andrews, appellant's sister, testified that she knew Mrs. Lumpkins "rather well" and that Mrs. Lumpkins drank daily and was "seldom sober" (Tr. 230). She said Mrs. Lumpkins would fall and have difficulty keeping her balance when she drank, although she actually saw her fall only once while she was drinking (Tr. 230). This occurred about one year ago in back of Mrs. Andrews' home as Mrs. Lumpkins was proceeding to their car. Mrs. Lumpkins was uninjured—"she just fell and I had to pick her up" (Tr. 231). She said her brother would drink sometimes on the weekends and that alcohol made him sleep (Tr. 231-232).

After the defense rested, appellant did not renew his motion for a judgment of acquittal. Thereafter there was a lengthy discussion between counsel and the court as to the appropriateness of instructing on the lesser included offense of manslaughter (Tr. 253-265). The prosecutor and the court initially did not believe that the evidence warranted such an instruction. However, the defense finally elected to request that the court instruct on the crimes of manslaughter and simple assault (Tr. 261). The prosecutor then agreed that it would be wise to give the manslaughter instruction (Tr. 264). The court granted appellant's request for the manslaughter instruction (Tr. 265), but declined to give an instruction

on simple assault (Tr. 263). Appellant's counsel informed the court that he would be satisfied with the second-degree murder and manslaughter instructions in the "manual" (Tr. 253).[15] After the court had instructed the jury, appellant's counsel expressed his satisfaction with the instructions as delivered (Tr. 302).

ARGUMENT

I. The evidence was sufficient for a reasonable person to conclude that appellant was guilty beyond a reasonable doubt of manslaughter.

(Tr. 12, 15-17, 20-21, 24-29, 31-32, 38, 42-58, 61-63, 76-80, 85-89, 94-97, 100, 115-120, 121-123, 127, 128, 133-134, 139, 141, 149, 151, 155-156, 158-160, 164, 173-175, 177, 181-183, 185, 192-195, 204-207, 228).

Appellant first contends that his conviction of manslaughter should be reversed because the trial court improperly denied his motion for judgment of acquittal of the offenses of second-degree murder and manslaughter. However, appellant was acquitted of second-degree murder, so that even if the trial judge erroneously submitted this offense to the jury for its deliberation (which we do not concede), his conviction of manslaughter is not reversible on this ground. *Howard* v. *United States*, 128 U.S. App. D.C. 336, 389 F.2d 287 (1967). Consequently, the only question is whether the evidence was sufficient to support appellant's conviction of manslaughter. See *Thompson* v. *United States*, 132 U.S. App. D.C. 38, 405 F.2d 1106 (1968); *Crawford* v. *United States*, 126 U.S. App. D.C 156, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

Relying on *Carter* v. *United States*, 102 U.S. App. D.C. 227, 252 F.2d 608 (1957), appellant maintains that his

---

[15] We assume that this refers to the standard "red book," JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA (1966).

conviction should be set aside because the Government's proof of his guilt by circumstantial evidence did not disprove every reasonable hypothesis except that of guilt, *i.e.*, that the inference that Mrs. Lumpkins accidentally fell on some glass while intoxicated and sustained the fatal laceration was as consistent with her being struck by appellant with a bottle. However, this is not the standard to be applied. *Holland* v. *United States*, 348 U.S. 121 (1954); *Thompson* v. *United States*, *supra; Hunt* v. *United States*, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963). Furthermore, the mere fact that the Government's case against appellant was circumstantial does not require a different standard for evaluating the evidence. This Court has held that there is no distinction between the respective weight to be given to either direct or circumstantial evidence, and that no greater degree of certainty is required of the latter than of the former. *Hunt* v. *United States*, *supra*, 115 U.S. App. D.C. at 3, 316 F.2d at 654. As has been stated by the Supreme Court, "circumstantial evidence in this respect is intrinsically no different from testimonial evidence." *Holland* v. *United States*, *supra*, 348 U.S. at 139-140.

The evidence at trial and reasonable inferences therefrom showed that appellant and his wife had a history of fighting, quarreling, and scuffling whenever they drank together on weekends (Tr. 15, 25, 42). Appellant did drink wine and beer even though he had been advised by his doctor about five years before this offense to reduce his intake of alcohol (Tr. 192-193, 228). Mrs. Lumpkins was a heavy drinker, drinking daily. Mrs. Williams, who knew Mrs. Lumpkins well, said that she did not have a tendency to fall down or injure herself while drinking (Tr. 31-32, 38, 44-46). Appellant was inclined to strike his wife, having done so only about one month before her death (Tr. 15-16, 24-26).

Mrs. Lumpkins purchased four bottles of wine after appellant returned home from work on July 19 and later went out for more wine shortly before 9:00 P.M. (Tr. 12, 17, 20-21, 43-44, 46-52). Appellant and his wife

drank this wine together (Tr. 127, 158, 195, 204, 206-207). Appellant consumed enough wine that night that the police officers noted the next morning that he smelled of alcohol (Tr. 101, 128), and Officer Bartly described appellant as appearing to be "somewhat intoxicated" (Tr. 101). Two witnesses testified that the Lumpkinses began to argue in their room between 11:00 P.M. and midnight (Tr. 26, 28, 53-54, 56-58, 76-77, 84). This quarrel continued despite an order from the landlady, Mrs. Williams, to be quiet (Tr. 26-29, 53-58, 61-63). During this quarrel Mr. Ryan heard glass breaking on two occasions in the Lumpkins apartment (Tr. 77-79, 85-89). The second sound of breaking glass was different from the first, as if a glass object had struck something and its pieces had then fallen to the floor (Tr. 78-79, 85-89). Thereafter there was complete silence in the Lumpkins apartment (Tr. 78). It may be reasonably inferred from this evidence that this was the point in the quarrel when appellant struck his wife in the forehead with a bottle which silenced her and caused the fatal laceration. Mr. Ryan's testimony that he heard only a man's voice in the neighboring apartment and no others when he returned home at 2:00 A.M. confirms this (Tr. 79-80, 94-97).

Detectives Day and Alexander investigated the crime scene and found a great amount of broken glass and blood throughout the room. They found the neck of a broken glass bottle, with the cap still attached, on one side of the room and the bottom of the bottle on the other side (Tr. 116-120, 121-122, 133-134, 141, 149, 155). The broken glass on the floor and the two sections of the bottle strongly suggest that it was this bottle with which appellant struck his wife. The further testimony of the police officers that there was glass under Mrs. Lumpkins' body, but none on top, and that the body was covered with a bedspread at the foot of the bed, gives rise to the inference that appellant placed her body there to give the impression that she had died accidentally. The presence of the glass-entangled and blood soaked clothes near Mrs. Lumpkins' head, coupled with Detective Alexander's con-

clusion that someone had made an effort to clean up the blood (Tr. 115-116, 123, 139, 155-156, 164), demonstrated further that appellant was the cause of his wife's death and that he sought by this means to conceal his guilt. This is confirmed by the dried blood on appellant's clothes and hands (Tr. 128, 159). The physical evidence in the room and the testimony of Mr. Ryan and Mrs. Williams were clearly sufficient to permit the jury to find that appellant did strike his wife with the bottle. This conclusion is supported further by appellant's own admissions that his wife had been annoying and nagging him that evening, that he told her he would strike her if she did not stop, (Tr. 158-160) and his statements to the officers that he could not remember whether he struck her or not (Tr. 128, 150-151, 160).

Dr. Rayford's testimony that Mrs. Lumpkins bled to death from a laceration on her forehead and that the nature of this wound was consistent with being struck in the face with a bottle additionally warranted the submission of appellant's guilt to the jury (Tr. 173-174). He said she would have had to collide with the glass (or other sharp object) with considerable force to sustain such a deep laceration (Tr. 174-175, 177). Appellant contends that Dr. Rayford's finding that there was "very little" bruising around the laceration establishes that Mrs. Lumpkins' death was probably accidental. Appellant, however, overlooks the doctor's explanation that the blood from the wound had flowed freely, thereby reducing the amount of bruising (Tr. 181-182, 185). Dr. Rayford did state that the laceration of Mrs. Lumpkins' forehead was consistent with an accidental fall (Tr. 183), but the other evidence in the case strongly suggests that she suffered her fatal injury at the hands of appellant. The jury was thus the proper body to evaluate all of the evidence and determine what actually happened. The jury having done so, its verdict should not be disturbed. *Johnson* v. *United States*, D.C. Cir. No. 21,851, decided March 23, 1970 (*en banc*).

II. Appellant was not entitled to an instruction on simple assault as a lesser included offense since there was no evidence to justify the giving of this charge.

(Tr. 186)

A jury may be instructed on a lesser included offense since under Rule 31(c), FED. R. CRIM. P., a "defendant may be found guilty of an offense necessarily included in the offense charged . . . ." However, before such an instruction may be given, the crime charged and the asserted lesser included offense must be in a greater-lesser included relationship, and the trial proof must justify the giving of that charge. In the case at bar appellee does not dispute the legal proposition that simple assault is a lesser included offense within the crime charged, second-degree murder; however, we strongly maintain that the evidence adduced at trial did not authorize an instruction on simple assault.

Although the indictment controls as to whether a particular offense is a lesser included offense, the trial proof governs as to whether an instruction on the lesser offense should be given. As early as *Sparf* v. *United States*, 156 U.S. 51 (1895), the Supreme Court indicated that there must be some evidence in the case to sustain a conviction on a lesser included offense before the jury may be so instructed. "A lesser-included offense instruction is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses." *Sansone* v. *United States*, 380 U.S. 343, 349-350 (1965). Such an instruction is proper only "where the charged greater offense requires the jury to find a *disputed factual element* which is not required for conviction on the lesser-included offense." *Id.* at 350 (emphasis added). An element may be factually disputed, even though it is not directly contradicted, if the Government's evidence is susceptible of two reasonable interpretations. *United States* v. *Comer*, —— U.S. App. D.C. ——, 421 F. 2d 1149 (1970). However, that analysis may not be the result of an extensive

picking and disregarding of evidence so as to distort the prosecution's case. *Cf. Brooke* v. *United States*, 128 U.S. App. D.C. 19, 385 F.2d 279 (1967). Thus, before a trial court may properly charge on a lesser included offense, the evidence must be such that "there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." MODEL PENAL CODE § 1.07(5) (1962).

Appellant merely contends that the trial judge should have instructed on the offense of simple assault because it is a lesser included offense of murder. He does not assert that there was any evidence at trial to support a finding of guilt of only simple assault, nor can he do so on this record. The record is replete with evidence which conclusively established that Mrs. Lumpkins bled to death from a laceration caused by a collision of her forehead with a sharp object. Dr. Rayford could not state exactly what type of object caused this laceration, but it was something sharp, perhaps "metal, tin, uranium, gold, [or] glass" [Tr. 186]. Other evidence shows that it was a glass object, and the only genuine issue thereafter, aside from the question of appellant's intent or state of mind, was whether the laceration was caused by an accidental fall or whether it resulted from being struck with a glass bottle in the forehead by appellant. Since there was no evidence to support a finding of guilt of simple assault, the trial judge's refusal to give the requested instruction on simple assault was not error.[16] *Belton* v. *United States*, 127 U.S. App. D.C. 201, 382 F.2d 150 (1967); *MacIllrath* v. *United States*, 88 U.S. App. D.C. 270, 188 F.2d 1009 (1951).

---

[16] The cases cited by appellant in support of this contention are clearly distinguishable from the instant case because there was found to be evidence in each of them to support the giving of the particular lesser-included instruction.

III. The trial court's instruction on the element of malice of second-degree murder does not warrant reversal of appellant's conviction for manslaughter.

(Tr. 253, 302)

Appellant's last contention is that the trial court erred in instructing the jury on the malice element of second-degree murder. This instruction was based on the Junior Bar's standard instruction.[17] Noteworthy initially is the fact that no objection was raised at trial regarding the questioned instruction; in fact, appellant's counsel indicated that he would be satisfied with the second-degree murder instruction in the "manual" (Tr. 253), and he did express his approval of all of the trial court's instructions after they were given (Tr. 302). Appellant should therefore be precluded from attacking this instruction on appeal. Rule 30, FED. R. CRIM. P.; *Levin* v. *United States*, 119 U.S. App. D.C. 156, 338 F.2d 265 (1964), *cert. denied*, 379 U.S. 999 (1965); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

The question of foreclosure notwithstanding, appellee submits that appellant was in no way prejudiced by this so-called erroneous instruction because he was convicted only of manslaughter, not of second-degree murder. His acquittal of second-degree murder cured whatever error resulted from this instruction on malice. *See Howard* v. *United States*, *supra*. Moreover, this instruction was not erroneous. Appellant asserts that this Court condemned substantially the same instruction in *United States* v. *Green*, —— U.S. App. D.C. ——, 424 F.2d 912 (1970); *United States* v. *Wharton*, D.C. Cir. No. 22,433, decided January 5, 1970; and *Green* v. *United States*, 132 U.S. App. D.C. 98, 405 F.2d 1368 (1968). In those cases, however, this Court was concerned with an instruction which equated intent with malice by advising the jury that a wrongful act intentionally done is done with mal-

---

[17] JUNIOR BAR SECTION, *supra* note 15, No. 83.

ice. The trial judge's instruction in the instant case did not create such an equation and is conspicuously different from those in the *Green* and *Wharton* cases. In addition, this instruction was in the context of a definition of malice which made it clear that willfulness and a lack of justification or excuse were essential elements of such a state of mind. It is thus evident that appellant's contention is totally without merit.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
DANIEL HARRIS,
GREGORY C. BRADY,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 399566 65

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,503

UNITED STATES OF AMERICA, APPELLEE

v.

LOUIS LUMPKINS, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit
FILED SEP 2 4 1970
Nathan J. Paulson
CLERK

Milton A. Kallis
John M. Treanor, Jr.
Attorneys for Appellant
Washington Building
1435 G Street, N. W.
Washington, D. C. 20005
Telephone: 783-1950
and 638-6996

FOR THE DISTRICT OF COLUMBIA

WRIT SHOW THE UNITED STATES DISTRICT COURT,

TONIC INGREDIENT VOLUNTARY

v.

UNITED STATES OF VIRGIN VOLUNTEER

No. [illegible]

[illegible]

[illegible]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,503

UNITED STATES OF AMERICA, APPELLEE

v.

LOUIS LUMPKINS, APPELLANT

REPLY BRIEF FOR APPELLANT

The Government's brief contains some major flaws which impel appellant's counsel to reply.

The case before the Court is one of circumstantial evidence based entirely on speculation. The proved facts do not lead to a legitimate inference that appellant struck his wife with a bottle and thus caused her death. No person except possibly appellant knows what happened on the night in question. He testified without contradiction that he did not know. The record lacks any evidence which reasonably and fairly tends to prove that he did the act charged in the indictment. It is fair and reasonable to infer that the death of appellant's wife was due to a forceful fall to the floor covered with sharp,

broken glass. This inference is more consistent than that of death due to a blow on the head, in view of the relatively small amount of bruise around the lethal wound. The evidence points to a quarrel between appellant and his wife, her call for help, loud noises in their room, sounds of breaking glass and a loud impact of a moving object striking a stationary object.

On this record there are adequate bases for acquittal. The chronic alcoholism, lack of control, unsteadiness of body, and childish behavior of appellant's wife easily explain how while drunk, she could have stumbled and fallen and thus hit her head on a sharp object on the floor. Other reasonable possibilities are mentioned in appellant's main brief. The Government has failed to negate any tenable hypotheses of innocence presented in this case. The net result is a verdict based on pure conjecture and surmise. In Wigfall v. United States, 97 U.S. App. D.C. 252, 230 F. 2d 220 (1956) at page 253 the Court stated:

> This Court has said that where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse. (Citing Hammond v. United States, 75 U.S. App. D.C. 397, 127 F. 2d 752 (1942).

and in Hunt v. United States, 115 U.S. App. D.C. 1, 316 F. 2d 652 (1963) the Court applied this doctrine and reversed a conviction of robbery because (a) the jury was allowed to speculate

as to guilt and (b) every fact proved by the Government was as consistent with the lesser offense of larceny.

The trial judge should have granted appellant's motion for judgment of acquittal. When the parties rested, appellant's counsel requested, among others, an instruction on manslaughter. Both the trial judge and the prosecutor then and thereupon said that the evidence did not warrant a manslaughter verdict. These expressions of appraisal of the evidence amounted to declarations by the judge and the prosecutor, respectively, that each one, thinking reasonably, had at least a reasonable doubt that appellant had committed manslaughter. The judge and the Government attorney each asserted, in effect, that there was no evidence upon which a reasonable mind might conclude appellant's guilt of manslaughter beyond a reasonable doubt. The evidence may have generated a suspicion but it failed to meet the standard which allows a trial judge to submit a criminal case to the jury. The motion to acquit should therefore have been granted. Crawford v. United States, 126 U.S. App. D.C. 156, 375 F. 2d 332 (1967); Cooper v. United States, 94 U.S. App. D.C. 343, 218 F. 2d 39 (1954); Curley v. United States, 81 U.S. App. D.C. 389, 160 F. 2d 229, Cert. den., 331 U.S. 837 (1947).

The lack of direct evidence and the pervasive ambiguity of inference in this case compounds the infirmities of the conviction. In Holland v. United States, 348 U.S. 121 (1954) the

Court at page 129 said that "appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is only an approximation." In a case, such as the instant appeal, "in which the evidence relied upon to establish guilt is entirely circumstantial, the trial judge may not deny a motion for judgment of acquittal and send the case to the jury unless, taking the view most favorable to the Government, there is sufficient evidence to support a verdict of guilty beyond a reasonable doubt." Battles v. United States, 388 F. 2d 799, 801-802 (5th Cir. 1968). Appellant's case therefore should have been withheld from the jury.

On page 20 of appellee's brief is a perfect example of the fallacy of insufficient and unrepresentative observation. Seven lines from the bottom of the page the Government says that appellant "was inclined to strike his wife, having done so only about one month before her death. (Tr. 15-16, 24-26)." Clearly the inference of "inclination" does not logically derive from but one incident occurring in seven years of married life. Appellant testified, without contradiction, that only on one occasion did he strike his wife and that the impact did not cause any bleeding.

On the same page 21 of appellee's brief, the Government twice begs the crucial question in the case. First is the

clear but unsupported assertion that "appellant struck his wife in the forehead with a bottle." Next is the lucid but unfounded statement that "it was this bottle with which appellant struck his wife." We thus see how by indirection the Government not only assumes as true the very contested allegation of lethal assault but also evades the tenable argument of appellant that his wife's death could stem from an accidental fall.

In its brief, appellee fails to answer the contentions of appellant in relation to the instructions on malice. The judge who conducted his trial is the same judge whom this court reversed in Wharton. One basis for the reversal was substantially the same instruction of which appellant complains. The Government on page 25 of its brief defends this instruction because it was based on the Junior Bar Section's manual. This position is without merit. Over six months before appellant's trial this court in Green held the particular jury charge in question to require a reversal. That the jury manual is defective is seen in Bush, as well as in Judge Leventhal's concurring opinion in United States v. Dixon, 135 U.S. App. D.C. 401, 419 F.2d 288 (1969).

CONCLUSION

For the reasons stated in this reply brief and in appellant's main brief, appellant's counsel submit that this court

should reverse the judgment of the District Court.

Respectfully submitted,

Milton A. Kallis

John H. Treanor, Jr.
Attorneys for Appellant
Washington Building
1435 G Street, N. W.
Washington, D. C. 20005
Telephone: 783-1950
and 638-6996

should reverse the judgment of the District Court.

Respectfully submitted,

Milton A. Kallis

John H. Treanor, Jr.
Attorneys for Appellant
Washington Building
1435 G Street, N. W.
Washington, D. C. 20005
Telephone: 783-1950
and 638-6996